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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **P. SWARTZ**	)	OTA Case No. 231014459

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Christopher W. Campbell, Representative

For Respondent: Ariana Macedo, Attorney

S. ELSOM, Hearing Officer: On January 21, 2026, Office of Tax Appeals (OTA) issued an Opinion modifying the action of the Franchise Tax Board (respondent) denying appellants' claim for refund of $240,378.48, to recalculate the late-payment penalty based upon the untimely payment of tax of $259,731.[1] In the Opinion, OTA held that appellant had established reasonable cause for the late payment of tax of $2,440,000.

OTA will grant a rehearing where one of the following grounds for a rehearing exists and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Shanahan*, 2024-OTA-040P.)

On February 19, 2026, respondent timely filed a petition for rehearing (petition) with OTA under Revenue and Taxation Code (R&TC) section 19334 on the basis that the Opinion is

[1] On appeal, the parties agree that appellant's October 11, 2022 payment of this amount is subject to the late-payment penalty.

contrary to law. Upon consideration of respondent's petition, OTA concludes that the ground set forth in this petition does not constitute a basis for granting a new hearing.

The "contrary to law" standard of review shall involve a review of the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) The question of whether the Opinion is contrary to law is not one which involves a weighing of the evidence, but instead, requires a finding that the Opinion is "unsupported by any substantial evidence"; that is, the record would justify a directed verdict against the prevailing party. (*Appeal of Shanahan*, *supra*.) This requires a review of the Opinion in a manner most favorable to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the Opinion if possible. (*Ibid*.) The question before OTA on a petition for rehearing does not involve examining the quality or nature of the reasoning behind OTA's Opinion, but whether that Opinion can or cannot be valid according to the law. (*Ibid*.)

In the *Appeal of Scanlon,* 2018-OTA-075P *(Scanlon)*, the taxpayers made an error in inputting the correct bank account information while attempting to make a third quarter estimated tax payment, causing the estimated tax payment to be rejected. The taxpayers made the same payment error in a prior tax year and conducted no subsequent review of their bank account to determine whether the payment had been made for the tax year at issue. In *Scanlon*, OTA held that, "[w]e would expect reasonably prudent taxpayers exercising due care and diligence to monitor their bank account and quickly ascertain whether a scheduled electronic payment from their account to FTB was in fact paid." *Scanlon's* statement concerns those taxpayers' failure to conduct any review of their bank account to verify that the payment had been made.

Respondent first argues that the Opinion is contrary to law because it removes the requirement established by *Scanlon* that a taxpayer must quickly monitor their account and ascertain whether a payment to respondent had been made. Respondent's argument effectively recasts *Scanlon's* holding as a two-part analysis, where to establish reasonable cause, a taxpayer must first monitor its bank account and then take an additional step to obtain a receipt or some form of verification from respondent that respondent received the payment. Respondent misinterprets the holding in *Scanlon*. The holding in *Scanlon* required taxpayers to quickly monitor their accounts to quickly ascertain whether the payment to respondent was in fact paid. *Scanlon* did not require taxpayers to obtain a receipt or other evidence that respondent had received the payment.

Unlike *Scanlon*, appellant here monitored his company's bank account to ascertain that the payment to respondent had been made. As stated in the Opinion:

> [appellant] instructed the Company's controller to pay his estimated taxes while both individuals were in the same office together, and then subsequently reviewed the Company's bank account to determine that the total payments had been made.

Respondent's argument was thus considered and rejected in the Opinion, and it does not constitute a ground for rehearing. (See *Appeal of Graham and Smith*, 2018-OTA-154P.) Respondent's dissatisfaction with the outcome of the appeal is not grounds for a rehearing. (*Ibid*.)

Respondent's petition further argues that the Opinion applies a "no economic benefit" test because it distinguishes appellant here, who relinquished the economic benefits of the payment intended for respondent, from the appellant in *Scanlon*, who failed to complete the payment of any amount and continued to hold the economic benefits of it. Respondent argues this test shifts the burden to discover an underpayment of tax from the taxpayer to respondent.

The Opinion did not assert or establish a separate test to determine reasonable cause based upon the economic benefits associated with the payment of tax. The taxpayer is in the best position to discover an underpayment specifically *because* the taxpayer retains the economic benefits of it. The exercise of ordinary business care and prudence would thus include review of bank statements where the taxpayer could quickly determine that the payment had been deducted from the account (thus affirming that the taxpayer no longer retained the economic benefits of the payment). Appellant here monitored bank statements to determine the payment had been made, while the appellant in *Scanlon* did not. Thus, the Opinion did not shift the burden to respondent to discover an underpayment of tax.

Second, the petition argues that appellant did not exercise business care and prudence because he failed to pay the tax at issue for over a year after he entered into the MIPA. This argument was considered and rejected in the Opinion, and appellant's dissatisfaction with the outcome does not establish grounds for rehearing. (*Appeal of Graham and Smith*, *supra*.)

Thirdly, the petition argues the Opinion's analysis that appellant's underpayment of approximately 10 percent of the total tax for the 2021 tax year sets an arbitrary standard whereby reasonable cause for the late payment of tax may be established if a taxpayer timely pays the majority of the tax due. The petition further argues that this position contradicts OTA's holding in the *Appeal of Moren*, 2019-OTA-076P (*Moren*).

The petition misstates the Opinion's position. OTA's references to the percentage of tax timely paid by appellant are specific to the facts of this appeal, and do not establish a separate criterion for abating a late payment penalty under R&TC section 19132. The Opinion analyzed

the proportion of tax paid by appellant here to distinguish it from the *Appeal of Friedman*, where the appellants did not discover substantial underpayments of tax due to their own failure to exercise ordinary business care and prudence in making the payments. In contrast, the Opinion determined that appellant's underpayment error occurred despite the exercise of ordinary business care and prudence, and the percentage of the underpayment made the error more difficult to detect. The Opinion specifically stated:

> Despite appellant's exercise of ordinary business care and prudence, the payment error occurred during a period of chaotic sales negotiations of the Company and resulted in underpayment of approximately 10 percent of the tax due, meaning that it was more difficult to detect.

In *Moren*, the appellant was notified by an estate one day prior to the payment deadline that the estate would make a $225,000 distribution to him, resulting in a "significant tax burden." Approximately four months later, the estate's accountant provided a Schedule K-1 to the appellant reporting that nearly the entire amount of the distribution was taxable but indicated he believed future amendments to reduce the amount of taxable income would be necessary. The accountant did not respond to the appellant's subsequent requests for the underlying information used to calculate the taxable amount of the distribution. As a result, the appellant filed his 2015 return to report the taxable distributions shown on the Schedule K-1 and paid the resulting tax approximately 8 months after the payment deadline. Respondent imposed a late-payment penalty and appellant appealed. In reversing respondent's determination and abating the penalty, OTA determined that, "[a]ppellant has shown that he exercised ordinary business care and prudence in attempting to pay his entire tax liability by the due date with the information available to him."

This Opinion here does not contradict OTA's determination in *Moren*. OTA's determination in *Moren* was based upon an analysis of the extent of the appellant's efforts to obtain information necessary to calculate his tax, rather than to verify payment of it, as the Opinion addressed here. As stated above, the Opinion's citation of the percentage of tax timely paid by appellant was relevant to the analysis of his argument and the extent to which he exercised ordinary care and business prudence, and is limited to that analysis alone.

Accordingly, OTA finds that the petition does not establish that the Opinion is contrary to law.

Signed by:
Seth Elsom
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Seth Elsom
Hearing Officer

I concur:

Signed by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

Date Issued: 8/31/2026

S. KIM, Dissenting:

I disagree with the majority and would have granted the petition for rehearing because I find the Opinion is contrary to law.

It is well established that penalty abatement is not warranted in situations where a taxpayer's error, mistake, or oversight resulted in a late payment which could have been prevented by the exercise of ordinary business care and prudence. (See, e.g., *Appeal of Friedman*, 2018-OTA-077P; *Appeal of Red Vision Systems, Inc.*, 2023-OTA-561P.)[2] The exercise of ordinary business care and prudence requires a taxpayer to take all reasonable steps necessary to ensure that a payment will be successful. (See *Appeal of Friedman*, *supra*.) What is considered reasonable depends on the facts and circumstances. (See *Appeal of Moren*, 2019-OTA-176P.) Where a taxpayer attempts to make a payment using FTB's Web Pay system or via a check issued to FTB, it can be reasonably assumed that FTB received the payment once the payment has been processed. (See *Appeal of Friedman*, *supra*.) In contrast, where the taxpayer "instructs" another individual to make the payment, as is the case here, it is not enough to verify that the payment was processed; ordinary business care and prudence dictate that the taxpayer first ensures the payment was issued to the correct payee.

Here, appellant did not verify that the payment was issued to the correct payee and thus did not exercise ordinary business care and prudence in failing to make a timely payment of tax. Appellant has not shown that his issuance of the payment to an incorrect payee was due to anything other than mere oversight. Accordingly, appellant has not established reasonable cause to abate the late payment penalty.

DocuSigned by:
Steven Kim
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Steven Kim
Administrative Law Judge

Date Issued: 8/31/2026

[2] It is also well established that mere oversight does not constitute reasonable cause to abate a late filing penalty. (See, e.g., *Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P; *Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)